84-214

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ALEXANDER L. STEVAS,
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1984

ANTHONY RUGGIERO,

Petitioner

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 773, and SILVER LINE, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the granting (and affirmance) of the Respondents' Motions for Summary Judgment was proper wherein there are disputed facts of record as to why the Petitioner filed an action for wrongful discharge of employment without invoking the union's international procedures to review his grievance and the grounds for discharge.

2. Does the aforesaid action deprive the Petitioner of his rights to due process of law since there was never any hearing in which undisputed "exhaustion of remedies" facts of record were established upon which the Motion for Summary Judgment could be based.

3. Does the aforesaid action deprive the Petitioner of due process of law since at least one other Circuit (8th Circuit) has held that the issue of whether the Petitioner failed to exhaust his intra-union remedies (prior to the institution of suit) is not an issue approp-

riate for Summary Judgment but is an issue of fact to be determined by a jury.

4. Has the Petitioner properly prayed for damages that would fall within the well recognized exceptions to the exhaustion requirement as found in Clayton v. United Automobile Workers, 451 U.S. 679 101 S. Ct. 2088, 68 L.Ed. 2d 538 (1981).

5. Must the suit against the employer necessarily fail if the suit against the union is dismissed on a Motion for Summary Judgment where the suit against the union is for breach of its fiduciary duty to represent the Petitioner and the suit against the employer is inter alia for breach of the collective bargaining agreement.

PARTIES INVOLVED (as per Rule 21.1(b))

The Petitioner, Anthony Ruggiero, Jr., was the Plaintiff in the U.S. District Court for the Eastern District of Pennsylvania and the Appellant before the U.S. Court of Appeals

for the Third Circuit.

The Respondents, the Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 773 (the union) and Silver Line, Inc. (the employer) were Defendants in the District Court and Appellees in the Circuit Court. They both filed Motions for Summary Judgment (although not simultaneously) and both are Respondents before this Honorable Court since both Summary Judgments are at issue.

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1.,3.The Court of Appeals for the Third Circuit has rendered a decision in conflict with another federal court of appeals on the same issue. The Third Circuit impliedly held disputed facts as to whether an employee has exhausted his internal union remedies, prior to the institution of suit, can be

AUTHORITIES CITED

cases

statutes and provisions

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Petitioner, Anthony Ruggiero, Jr., (hereinafter Plaintiff) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit to review its decision affirming the Motions for Summary Judgment granted in favor of both Respondents (hereinafter Defendant-union and

Defendant-employer).

JUDGMENT AND ORDER BELOW

The Memorandum Opinion of the Court of Appeals for the Third Circuit, No. 83-1703, unpublished, is set out as Appendix "A", app. 3, as per Rule 21.1(k)(i) of this Court.

JURISDICTIONAL STATEMENT

On April 30, 1984, the Court of Appeals for the Third Circuit filed its Order and Memorandum Opinion herein (Appendix "A", app. 1). Plaintiff's timely filed Petition for Hearing was denied on May 17, 1984. Plaintiff's timely filed Petition to Stay Issuance of the Mandate was granted on June 5, 1984, and the issuance of the certified judgment in lieu of formal mandate was stayed until June 23, 1984.

This petition to review the judgment of a federal court of appeals in a civil case

is timely filed within ninety (90) days after denial of Petition for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), Section 2101(c) and Rules 20.2 and 20.4 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No personal shall be...deprived of life, liberty or property without due process of law;..."

Rule 56 of the Federal Rules of Civil Procedure provices in pertinent part:

56(c)

> "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact..."

56(d)

> "...the court at the hearing of the

> motions...shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted... and directing such further proceedings in the action as are just..."

STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiff filed an action in equity in state court for breach of the Defendant-Union's duty to represent the Plaintiff in a grievance he filed for wrongful discharge from his employment as a truck driver with the Defendant-Employer. The Plaintiff also alleged the Defendant-Employer breached the collective bargaining agreement and acted in concert with the Defendant-Union to deny his claim.

The suit was removed to federal court by the Defendant-Union pursuant to 28 U.S.C. Section 1441(b).

Thereupon, the Parties engaged in various discovery and a pre-trial conference was held

and the matter was to be listed for trial after September 1, 1981. (See Appendix "C" App. 11.) Nevertheless, almost a year later, the Defendant-Union, on July 22, 1982, filed a Motion for Summary Judgment. The Defendant-Employer filed its Motion for Summary Judgment a year after that on August 15, 1983.

The U.S. District Court for the Eastern District of Pennsylvania granted both Motions for Summary Judgment and the Court of Appeals for the Third Circuit affirmed (Appendix "A", App. 1) and denied Plaintiff's timely filed Petition for Re-hearing (Appendix "B", App. 10.)

B. Jurisdiction of the Trial Court (as per Rule 21.1(a))

The basis for federal jurisdiction in the court of the first instance is Section 301(a) of the Labor Management Relations Act, 29 U.S. C. Section 185 which provides, in pertintent part:

> "Suits for violations of contracts between an employee and a labor organization representing employees

> in an industry affecting commerce... may be brought in any district court of the United States...without respect to the amount in controversy or without regard to the citizenship of the parties."

Further, 28 U.S.C. Section 1441(b) provides in pertinent part:

> "Any civil action of which the district courts have original jurisdiction... shall be removable [from the state court] without regard to the citizenship or residence of the parties..."

C. Statement Of Facts

PREFACE

The Plaintiff, Anthony Ruggiero, Jr., was an employee of the Defendant, Silverline, Inc., for approximately thirteen (13) years. During this period he was a member in good standing of the Defendant, Teamsters Local 773. (See Appendix "E", App 38., Plaintiff's Affidavit.) He had been employed as a truck driver when, on or about December 17, 1976, a dispute arose as to whether he should take a

certain delivery route with which he was not familiar and which was not the customary route for which the Plaintiff bid and had been given. (See Appendix "H", App. 62, Answer to Interrogatory No. 24.) As a result of Plaintiff's refusal to take such run, he was discharged.

Although at the time, the Plaintiff had been advised he was "laid-off" (and did, in fact, collect unemployment compensation), he was never subsequently called back to work although men with less seniority were called back or hired and, in fact, an employee who engaged in the same actionable conduct on the same day as the Plaintiff, was re-hired. (See Appendix "G", App. 56, Depositions of another employee.) As a result, the Plaintiff alleges he was, in effect, discharged from his employment.

EXHAUSTION OF UNION REMEDIES

The Plaintiff alleges he filed a grievance

(see Appendix "D", App. 16, Paragraph 11(c) of Complaint) protesting the discharge although the union argues no grievance was ever filed. From December of 1976 through November of 1977, the Plaintiff requested the local union No. 773 to process the matter through proper union machinery and follow the applicable collective bargaining agreement. In addition, the Plaintiff inquired into the status of available work during the period. Although Plaintiff had attempted to exhaust his union remedies at the local level (without success) he could not have exhausted union remedies at the international level since the time periods had expired or would shortly expire[2] and, moreoever, his complaint was with the local union and not the International.

[2]Pursuant to Article XIX, Section 1(b) of the Constitution of the International Teamsters Union, "any charge based upon alleged misconduct which occurred more than one (1) year prior to the filing of the charge is barred..."

During the initial year following discharge, the Plaintiff was never advised of the status of his grievance nor did either Defendant ever comply with the collective bargaining agreement in effect between the local union and the employer and specifically Article XII, Grievance Procedure. (See Appendix "D", App. 16, Paragraph 11(d) of Complaint.)

Upon seeking private legal representation, Plaintiff's counsel asked that the grievance procedure be followed and Plaintiff was led to believe an arbitration hearing would be held, evidenced by confirming correspondence of Plaintiff's counsel. (See Appendix "F", App. 44, Plaintiff's Counsel's Affidavit.) Such hearing was scheduled for December 19, 1978.

It is noteworthy that although this hearing was scheduled two (2) years after the discharge, the Plaintiff was never advised of any intra-union machinery (at the international level) to review the local union conduct. (See Appendix "E", App. 38.) In fact, the Plaintiff

was never advised of such intra-union procedures[3] until all applicable time limits to present said claims had expired. This is certainly the reason why the Plaintiff would agree to an arbitration hearing two (2) years after his discharge.

However, when the day came for the "arbitration", the Plaintiff was advised it was only to be a "mediation" of the dispute and when the local union Business Agent learned that a stenographer was present, he stated to the Plaintiff that the union would not proceed with the matter and the Plaintiff "should file any and all necessary lawsuits and other matters to protect his interest". (See

[3]Although the Defendant-Union in its Answer to the Complaint (Third Defense) alleges Plaintiff did not exhaust his intra-union remedies, no copy of the International Constitution allegedly applicable was ever made available for review by the Plaintiff until Motion for Summary Judgment was filed (July of 1982) that being five and one-half (5½) years after the discharge!

Appendix "E", App. 41, Plaintiff's Affidavit and Exhibit "A" attached thereto).

Further, prior to the hearings, the local union's representatives had discussed the matter with the mediator and when the mediator was questioned concerning his union/employer partiality, the mediator admitted same but advised that he could never be subpeonaed to testify in court so his partiality could never be proven! (See Appendix "E", App. 38, Plaintiff's Affidavit.)

At that juncture, Plaintiff and his counsel felt any further exhaustion of intra-union remedies would be futile and proceeded by way of suit.

FILING OF SUIT

As a result, a full Complaint in the instant suit (filed in the state court) was filed on or about May of 1980, three and one-half (3½) years after the discharge. The matter was removed to federal court by the

Union-Defendant. Thereupon, responsive pleadings were filed and the Parties engaged in discovery.

In July of 1982, the Union filed a Motion for Summary Judgment alleging the Plaintiff should have exhausted his union remedies through the international union procedures and level rather than proceed with suit and such was granted.

Nevertheless, it is the Plaintiff's position that not only did the conduct of the Union evidence a breach of the union's obligation to represent its members fairly and in good faith[4] which would now estop from

[4]The Plaintiff strenuously objects to what appears to be the lower court's blind reliance on the self-serving affidavit of Anthony Molinaro, Sr. (union agent) and use of his deposed statements to make its case. Obviously, the Plaintiff disputes Molinaro's position. Yet, the Union-Defendant uses these disputed statements in an attempt to "bootstrap" itself to a tenable legal position. These are the very issues of material fact that are disputed and cannot be relied upon in determining a Motion for Summary Judgment.

from alleging a failure to exhaust intra-union remedies, the union representatives knowingly prejudiced the Plaintiff's case and advised the Plaintiff to file the very suit to which the union now objects. Further, the time to file an international appeal had expired a year before the arbitration v. mediation hearing was ever held!

Subsequently, the Employer-Defendant filed a Motion for Summary Judgment and such was granted on the basis of the Union-Defendant's successful Motion for Summary Judgment. However, it must be remembered that the Plaintiff has not only alleged the Employer acted in concert with the Union, but failed to abide by the collective bargaining agreement in its own right. (See Appendix "D", App. 24, Paragraph 21 of the Complaint.) As a result, the Motions for Summary Judgment do not coincide in all regards and the employer's Motion for Summary Judgment need not have been necessarily granted on the basis of the union's

motion.

Additional details, where needed, are set out in the course of the Points which follow.

REASONS FOR GRANTING THE WRIT

The treatment of the Plaintiff's case demonstrates an alarming trend for the Courts of the Third Circuit to decide factual issues without hearings, without attempts to establish undisputed facts of record and thereby permit a Judge to usurp the function of a jury or other fact-finder in these matters.

Certainly, the concept of due process requires that a Plaintiff have his "day in court" on disputed fact issues wherein each side is given the opportunity to test the evidence and alleged facts through cross-examination and other truth-seeking tools.

Finally, this decision by the Third Circuit is squarely in conflict with other Circuits on the issue and such conflict can only be resolved by a review by this Honorable Court.

PREFATORY STATEMENT
(Applicable to all following points)

Rule 56 of the Federal Rules of Civil

Procedure permits a party to file a motion for summary judgment where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". (Rule 56(c).)

Case law is legion that a trial judge should be slow in granting a motion for summary judgment which deprives a litigant to a trial by jury where there is a reasonable indication that a material fact is in dispute. [Estepp v. Norfolk W. Ry. Co., 192 F.2d 889 (1951), Aetna Ins. Co. v. Cooper Wells & Co., 234 F.2d 342 (1956), Begnaud v. White, 170 F.2d 323 (1948), Stone v. Nelmor Corp., 101 F. Supp. 569 (1951)]

Summary judgment should be used sparingly so that no Plaintiff having a scintilla of merit to his cause should be denied his day in court. [Manok v. Southeast Dist. Bowling Association, 306 F. Supp. 1215 (1969), Dawn v. Sterling Drug, Inc., 319 F. Supp. 358 (1970).]

As a result, summary judgment is a remedy that is strictly construed and granted

sparingly. With this background, we move to the issues before this prestigious Court.

1.

Whether the granting (and affirmance) of the Defendants' Motions for Summary Judgment was proper wherein there are disputed material facts of record as to why the Plaintiff filed an action for wrongful discharge of employment without invoking the union's international procedures to review the grievance and the grounds for discharge.

2.

Does the action deprive the Petitioner of due process of the law since there was never any hearing in which undisputed "exhaustion of remedy" facts of record could be established upon which the Motion for Summary Judgment could be based.

[Points 1 and 2 are so related - Point 2 is

actually a single facet of the more inclusive Point 1 - that both are presented together.]

The synopsis herein is a two-fold and in the alternative. First, were there any disputed material facts of record since the Plaintiff, in this case, was not required to exhaust his internal union remedies or, secondly, and in the alternative, did the Plaintiff so exhaust them?

(a) The Plaintiff was not required to exhaust his intra-union remedies under the facts and circumstances of this case.

The Court of Appeals relies upon the case of Clayton v. United Auto Workers, 451 U.S. 679 101 S. Ct. 2088, 68 L.Ed.2d 538 (1981) for the principle that the Plaintiff is required to exhaust intra-union remedies prior to the initiation of suit. Yet, Clayton also holds that exhaustion is not required when an internal union appeals procedure cannot (a) "result in reactivation of the

employee's grievance..." or (b) "award the "complete relief sought..." 451 U.S. at 679, 101 S. Ct. at 2093. In the case at bar, these exceptions have been met.

First, the union in the case at bar has always taken the position a grievance was never filed. Accordingly, assuming arguendo there was never any grievance to pursue, the intra-union procedures would not have been available to reactivate a non-existent grievance. Secondly, time limits barred the Plaintiff from filing an international appeal after the "arbitration" hearing.

In a case styled Ruzicka v. General Motors Corporation, 532 F.2d 306 (1975), for twenty-seven (27) months an employee had sought intra-union relief against his local union and the Court held that was a sufficient exhaustion of his intra-union remedies to hear the case. In the present case, two (2) years after discharge was an "arbitration" hearing scheduled which was, in actuality, a mediation

session and in which the union's Business Agent would not participate since a stenographer was present. Prior to that time, and for a year following discharge, there had been no response at all from the union concerning the grievance and its status or disposition.

More importantly, it cannot be overlooked that the International Union is not a party defendant to this suit nor has it been joined by any other party. As a result, it could be argued the provisions of the International Constitution would not apply in the case at bar. "That the Union's appellate procedures are available and adequate in a general sense will not be relevant to situations where the Plaintiff claims that the system, as applied to him, was not available or adequate." (See Ritter v. Western Electric Company and International Brotherhood of Electrical Workers, 504 F. Supp. 886 (1980) footnote 16.) Further, where the exhaustion of said remedies is un-

available, inadequate or would entail meaningless or futile gestures, the union member need not exhaust same, even though he, as a union member, is contractually bound to do so. (See Ritter, supra, 504 F. Supp. at 888.)

In the case at bar, the Plaintiff has plead with specificity his attempts to exhaust his intra-union remedies. (See Appendix "D", App. 15-19, Paragraph 11 of the Complaint.) His attempts covered two (2) to three (3) years and the Plaintiff waited three and one-half (3½) years before filing the full Complaint. Then an "arbitration" hearing was eventually scheduled (two [2] years after discharge) but it was not a hearing as had been represented by the union Business Agent. It was a mediation session where the Mediator was already predisposed in favor of the union and the employer as the result of ex parte discussions of the case with and between the union and/or the employer. Also, the union representative advised that suit should be filed if the

Plaintiff was not happy with the situation. Finally, the Mediator refused to reschedule the hearing as an arbitration when requested by Plaintiff's counsel.

In Falsetti v. Local No. 2026, United Mine Workers of America, 400 Pa. 145, 161 A.2d 882 (1960), the Pennsylvania Supreme Court held there is no need for a member to exhaust internal remedies where (1) the officials have, by their own actions, precluded the member from having a fair or effective trial or appeal or where the association officials are obviously biased or have pre-judged the member's case before hearing it; (2) where the procedure is unduly burdensome; and, (3) where the remedies would subject the member to irreparable injury.

In the case at bar, the Complaint, Answers to Interrogatories and the two (2) affidavits contra to Defendant's Motion for Summary Judgment and the exhibits attached thereto (Appendix "D", "E" and "F", App. 13-55)

allege facts that show the Defendant's officials prejudiced the Plaintiff's case and prevented a fair and effective appeal since the union officials never even advised the Plaintiff or his counsel of the international intra-union remedies within the necessary appeal periods. Also, as heretofore indicated, the union Business Agent prejudiced the member's case before the Mediator. Thirdly, the procedure is unduly burdensome as applied to the Plaintiff since it had been over two (2) years[5] since the discharge and the matter had only been listed for a mediation session. Finally, such remedy would subject the Plaintiff to irreparable injury resulting from the lapse of time between the discharge date and final resolution.

The Union in the lower courts argued that the cases of McClain v. Mack Trucks, Inc.,

[5]In fact, it is interesting that in Clayton, supra, Justice Rehnquist (who was joined by Justices Stuart, Powell and Chief Justice Burger) in his dissent reasoned an employee should attempt to exhaust remedies for only four (4) months before bringing suit.

494 F. Supp. 114 (E.D. Pa. 1980) and Pawlak v. Teamsters Local 764, 444 F. Supp. 807 (M.D. Pa. 1977), aff. 571 F.2d 572 (3d Cir. 1978) which held the failure to exhaust the intra-union international procedures bars the Plaintiff from maintaining suit. Yet a close reading of McClain reveals the Plaintiff there did not contest or deny the adequacy or availability of such international constitutional procedures. In the case at bar, the Plaintiff does contest same since he was not even made aware of them and, more importantly, the conduct of the local union representative would cause a reasonable person to doubt their efficacy or availability. In Pawlak, the Court based its decision on the fact that Pawlak did receive a copy of and know of the international procedures. Nowhere in the case at bar is it alleged the Plaintiff did actually receive or was supplied with a copy of the international procedures until the Motion for Summary Judgment was filed by the Union.

Accordingly, it is the Plaintiff's position that under the facts and circumstances of this case and as applied to him, he was not required to exhaust intra-union remedies.

(b) If the Plaintiff was required to exhaust intra-union remedies, he did reasonably attempt to do so.

It is respectfully submitted the Plaintiff did reasonably attempt to exhaust the union remedies available to him.

In his Complaint, the Plaintiff as would be required, affirmatively pled the exhaustion of his intra-union remedies as a precondition of suit. (Cubas v. Rapid American Corp., 420 F. Supp. 663 [E.D. Pa. 1976].) Further, even if such was not the case, a Plaintiff would have been allowed to amend his Complaint to plead with greater specificity. (Lang v. Windsor Mount Joy Mutual Insurance Company, 487 F. Supp. 1303 [E.D. Pa. 1980] Holman v. Carpenter Technology Corporation, 484, F. Supp.

406 [E.D. Pa. 1980].)

Moreover, the collective bargaining agreement in effect between the Union-Defendant and the Employer-Defendant makes no mention of international union appeal machinery that would be applicable. Pursuant to Article XIII, Section 1, "Discharge or Suspension" (see Appendix "D", App. 36) there is no reference whatsoever to union appeal machinery relating to discharge.

Article XII deals with grievances (see Appendix "D", app. 26) and the language of that Article is worded to a mandatory and exclusive fashion:

> Section 1: Grievance Procedure
>
> All grievances or disputes...shall be handled in the manner hereinafter set forth...(emphasis supplied)

As a result, the Plaintiff did exhaust his remedies up to and including waiting two (2) years for an arbitration hearing, and then only to find the union merely scheduled a mediation session with a pre-disposed Mediator.

Then, to add insult to injury, the union would not proceed with the hearing or session since a stenographer was present. Was making a record of the proceedings that much of an imposition, especially when the Plaintiff was bearing the cost of same? The Plaintiff respectfully submits this question answers itself.

For the year following discharge, the Plaintiff would personally contact the union and employer concerning the status of his grievance and the status of his "lay-off". Yet, the union did not supply him with written reports of the Step One and Step Two meetings as required by Article XII aforementioned. In fact, the Plaintiff was told by the Business Agent, "I told you before, I'll contact you." (See Appendix "D", App. 17, Paragraph 11(e) of Complaint.)

After private counsel became involved and forwarded a series of letters requesting arbitration (such letters never being contra-

dicted, especially as to the status of the arbitration v. mediation hearing) a hearing was scheduled which the union cleverly led all to believe was a hearing pursuant to Article XII of the collective bargaining agreement. The Plaintiff appeared but the union, through its Business Agent, would not proceed.

As a result, pursuant to the aforesaid collective bargaining agreement, the Plaintiff, at that point, had reasonably attempted to exhaust his available remedies and proceeded with suit.

(c) The necessity of a hearing to establish the facts.

In a case styled Hines v. Local Union 377, Chauffeurs, Teamsters, Warehousemen and Helpers, 506 F.2d 1153 (1974), an action was brought by a truck driver for damages resulting from wrongful discharge and the union's breach of the duty of fair representation. There, summary judgment in favor of the union was

reversed. In doing so, the Court relied upon St. Clair v. Local No. 515, 422 F.2d 128 (1969) which held although the evidence of bad faith was minimal, there was enough to present a jury question (506 F.2d at 1155).

In the case at bar, there are substantial issues of material fact concerning the exhaustion issue, the union's actions in failing to abide by the applicable collective bargaining agreement, the employer recalling to work employees with less seniority (and the union not objecting to same), the propriety of the mediation v. arbitration strategy, the union's allegations of the non-existence of the grievance, so on.

In a case styled Willett v. Ford Motor Co., 583 F.2d 852 (1978), the court held there were sufficient facts to warrant a trial on a claim by an employee for improper discharge against the employee and failure to represent against the union. There the court held even one issue of disputed fact (concerning the notifi-

fication of the union's decision to drop the grievance) was sufficient.[5] Further, in Willett, the court, faced with conflicting affidavits, even held an evidentiary hearing to resolve the credibility issue. And it was made very clear that a court cannot resolve disputed issues of fact in ruling a motion for summary judgment. (Felix v. Young, 536 F.2d 1126, 1130 [1976].) As in Sarnoff, v. Ciaglia, 165 F.2d 167 (1947), a court cannot resolve issues of credibility on the basis of conflicting affidavits. In the case at bar, the affidavit of the Business Agent dealt solely with the Plaintiff's failure to exhaust his

[5]In Willett, as in the case at bar, the employee alleged the union did not, for five (5) months, inform the employee of its decision not to press the grievance past the second stage hearing, all while the employee was calling to find out what was happening. That would be evidence to support a finding of bad faith. In the instant case, this took place throughout the year after discharge. A fortiori, there is a genuine issue of material fact concerning the union's bad faith.

international union remedies and the denial of the Plaintiff's unfair labor practice charge. Contrasted to this, the Plaintiff's affidavit states he was never advised of these procedures and, as such, were not available to him and also averred is the conduct of the union during the course of pre-suit representation. There is even a dispute as to the exhaustion requirement whereby the Plaintiff would contact the union Business Agent to pursue the matter and the agent said "I told you before, I'll contact you." Certainly, these are disputed issues of material fact.

The Defendant-Union would have this Court believe that the only disputed issue goes to the union's failure to arbitrate in the case. As stated above, the Complaint, Affidavits and Deposition enumerate <u>many</u> areas of conduct that would classify as incomplete and improper union representation and would constitute failure to act in good faith if proven i.e. approving a recall of an employee with less

seniority but similarly situated, the reliance of the Plaintiff in believeing an arbitration hearing was to be scheduled, the non-applicability or the unavailabity of the international intra-union procedures, the Plaintiff's position that he was never advised of the "obey and grieve" rule, the Plaintiff's position that a grievance was filed at the local level and now denied by the local union, so on ad nauseum.

The due process clause of the U.S. Constitution provides no person shall be deprived of life, liberty or property...without due process of law." Certainly, the granting and affirmance of the Motion for Summary Judgment does so since, without a truth-seeking hearing, the Court accepts one version of disputed facts of record as true and grants a motion denying a Plaintiff of ever having his claim heard by a jury or fact-finder. This result cannot be justified under any principle of law.

3.

Does the aforesaid action deprive the Petitioner of due process of law since at least one other circuit (8th Circuit) has held that the issue of whether the Petitioner failed to exhaust his intra-union remedies (prior to the institution of suit) is not one appropriate for Summary Judgment.

In the case of Sandobal v. Armour & Co., 429 F.2d 249 (1970) the 8th Circuit of Appeals was called upon to decide a breach of an employment contract alleging loss of wages, loss of pension benefits and other concomitant benefits. Although it is unclear whether jurisdiction was based upon Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, the Court ruled upon the issue of the exhaustion of remedies.

In Sandobal, the plaintiff, prior to the the institution of suit, complained of the action to union members and company officials,

had an attorney write two (2) letters and then encountered problems as the result of this private attorney representation since the union felt it was the exclusive bargaining agent for the plaintiff. Five (5) years after the discharge, suit was filed.[6]

Although the major issue in the case was whether summary judgment should be granted on the basis of the statute of limitations, the court also ruled in regard to the union alternate argument of non-exhaustion. In 429 F.2d at 257 we read:

> "This contention [summary judgment on the basis of non-exhaustion of union remedies] is not suitable for summary judgment in this case. There is a substantial disagreement between the parties as to whether the Plaintiff did attempt to comply with the grievance machinery and whether his efforts were blocked by the wrongful acts of the company and the union. These are issues of fact which must be determined by a full trial."

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[6]It is interesting to note that in the case at bar, the Plaintiff did far more in seeking to exhaust his union remedies.

In a case styled Holder v. Pet Bakery Division, I.C. Industries, Inc., 558 F. Supp. 287 (1982), the Court (in 558 F. Supp. at 291 n.6) reiterated the exhaustion issue were questions of fact citing Sandobal with approval.

In fact, it has been held that under certain state law, an employee suing for wrongful discharge under a collective bargaining agreement does not have to exhaust administrative remedies prior to filing suit. (Poppert v. Brotherhood of Railroad Trainmen, 189 N.W.2d 469 [Nebraska Supreme Court].)

In Fosbroke v. Emerson College, 503 F. Supp. 256 (1980) a professor sued a college for severance pay and the college filed a motion to dismiss since the union was not joined. The district court (1st Circuit, Mass.) denied the motion and reasoned in 503 F. Supp. at 257:

> "A Complaint should be dismissed if Plaintiff is not entitled to relief under any set of facts she could prove...If proven, the facts alleged would constitute a basis for recovery against the Defendant College, therefore the Complaint should not be dismissed."

In the case at bar, a review of the Complaint does, in fact, state a cause of action and should not be dismissed on a motion for summary judgment without a trial on the facts as alleged.

As a result, a conflict within the courts requires the highest court in the land to resolve this issue.

4.

Has the Plaintiff properly prayed for damages that would fall within the well recognized exceptions to the exhaustion requirement as found in Clayton, supra.

Contrary to the lower court's argument, the Plaintiff is seeking recovery of his lost job and back pay, but as collateral and consequential damages. A review of the Complaint, (see Appendix "D", App. 22 , Paragraph 16, the Prayer for Relief of the Complaint) reveals that "loss of employment,

lost wages and lost benefits "are prayed for as damages collateral to the union's breach of duty. As a result, the Clayton excpeitons are satisfied.

Further, had the Plaintiff directly asked for re-instatement, as the lower court proposes, the instant suit would have been federally pre-empted by Section 7 or Section 8 of the National Labor Relations Act. Instead, the Plaintiff seeks redress for the injury to the union-member relationship and collaterally askes for re-instatement, back pay and other consequential damages. In International Organization of Masters, Mates and Pilots of America, Local No. 2 v. International Organization of Masters, Mates and Pilots of America, 414 Pa. 277, 199 A.2d 432 (1964) U.S. cert. den. in 379 U.S. 840, the Pennsylvania Supreme Court held the lower court erred in holding its jurisdiction was pre-empted by the NLRB where the Plaintiff was seeking redress to his union-member relationship and not his employment

relationship. Nevertheless, even if the Plaintiff is seeking only redress of his union-member relationship, "collateral relief in the form of consequential damages for loss of employment was not to be denied" 414 Pa. at 282. In Butler v. Yellow Freight System, 374 F. Supp. 747 (1974), this court has affirmatively stated that district court must fashion appropriate remedies in Section 301 cases. Remedies under Section 301 must be carefully and specifically tailored to meet the problems and needs that arise in a particular case. Accordingly, the Plaintiff's claim for collateral and consequential damages is not only proper but provides the court the opportunity to fashion and tailor the remedies as deemed appropriate.

Further, the Plaintiff should not be penalized for a Complaint that may have been more artfully drawn. The Complaint challenges the union's role as fiduciary and should be upheld as was the Complaint in Richardson v.

Communication Workers of America, et al., 443 F.2d 974 (1971).

5.

Must the suit against the employer necessarily fail if the suit against the union is dismissed on a motion for summary judgment, where the suit against the union is for breach of its fiduciary duty to represent the Plaintiff and the suit against the employer is inter alia for breach of the collective bargaining agreement.

To be sure, the Plaintiff alleged the employer acted in concert with the union to deprive the Plaintiff of his rights. A decision on this issue concerning the union necessarily decides this issue concerning the employer.

Yet, it seeks to have been overlooked that the Plaintiff also alleges the employer, in its own capacity, failed to follow the collective bargaining agreement, Article XIII, by

failing to give a written notice of discharge, by failing to give a prior written warning and by discharging without just cause.

As a result, even if the claim against the Union fails, there are disputed issues of fact concerning the Plaintiff's claim against the employer on this issue and summary judgment is inappropriate.

CONCLUSION

> "The individual's interest may more often be initiated without indirectiveness or deliberate discrimination. Incomplete investigation of the facts, reliance on untested evidence, or colored evaluation of witnesses may lead the union to reject grievances which more objective inquiry would prove meritorious. Union officials burdened with institutional concerns may be willing to barter unrelated grievances or accept wholesale settlements if the total package is advantageous, even though some good grievances are lost. Concern for collective interests and the needs of the enterprise may dull the sense of personal service."

(Clyde W. Summers, "Individual Rights in Collective Agreements and Arbitration" 37 N.Y.

U.L. Rev. 362, 393 (1962).)

The actions of the lower courts in granting and affirming the motion for summary judgment smack of Mr. Summers' reflections.

The Plaintiff should be permitted a full and complete trial to prove his contentions. A deprivation of this right, is a deprivation of the principles upon which our American system of jurisprudence is based.

Respectfully submitted,

Zito, Martino and Karasek

By: Ronold J. Karasek

Ronold J. Karasek, Esquire
641 Market Street
Bangor, PA 18013
(215) 588-0224
Counsel for Petitioner

APPENDIX

Separately Bound

84-214 (2)

NO.

Office-Supreme Court, U.S.
FILED
JUN 23 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1984

ANTHONY RUGGIERO,

Petitioner

vs.

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
LOCAL NO. 773, and SILVER LINE, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

Ronold J. Karasek, Esquire
Zito, Martino and Karasek
641 Market Street
Bangor, Pennsylvania 18013
(215) 588-0224
Counsel for Petitioner

APPENDIX "A"

App. 1.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 30, 1984

TO: Ronold J. Karasek, Esquire

Daniel E. Cohen, Esquire*
Seidel and Cohen

Andrew L. Markowitz, Esquire*
Stephen C. Richman, Esquire
Markowitz & Richman

NOTICE OF JUDGMENT

This Court's memorandum opinion was filed and Judgment was entered today in Case No. 83-1703 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 25(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

ml

*See Bill of Costs form attached.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1703

RUGGIERO, JR., ANTHONY,

Appellant

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 773 and SILVER LINE, INC.

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 80-1932) District Judge: Honorable E. Mac Troutman

---

Submitted Under Third Circuit Rule 12(6)
April 27, 1984
Before: ALDISERT, WEIS, and ROSENN, Circuit Judges

(Filed April 30, 1984)

MEMORANDUM OPINION OF THE COURT

ALDISERT, Circuit Judge.

This appeal presents two questions for

decision: did the district court err in granting summary judgment in favor of both the union and the employer; and did it err in refusing to impose sanctions against the union for filing the summary judgment motion in an untimely and dilatory manner. We find no error and affirm.

Anthony Ruggiero, Jr., appeals from an adverse summary judgment. Ruggiero, a former employee of Silver Line, Inc., and a member of Teamsters Local 773, filed a complaint alleging that Silver Line breached its collective bargaining agreement with the union by discharging the appellant. He further alleged that the union breached its duty of fair representation by its failure to process his claims against the company to arbitration. After answers were filed and discovery completed, the union filed a motion for summary judgment. The district court granted the motion on the ground that the appellant had failed to exhaust his internal union remedies. Later, Silver Line filed a motion for summary judgment. This was unopposed by appellant, who

did so "without prejudice to his rights to contest on further appeal the court's earlier granting of the summary judgment in favor of the union." App. at 78. The district court entered the order granted summary judgment in favor of the company. This appeal followed.

For 13 years appellant was employed by Silver Line as a truckdriver. In December 1976 he was assigned to follow a certain delivery route anf refused, contending that it was unfamiliar to him. He was discharged. Several days later the union business agent, Anthony Molinaro, tried to arrange for a meeting to be held with the company to discuss the company's refusal to permit Ruggiero to return to work. The company's general manager refused.

The first step in the grievance procedure contained in the collective bargaining agreement provided:

> All grievances must be made known in writing to the other party within five (5) working days after the reason for such grievance has occurred.

App. at 17. It is contested whether Ruggiero ever filed a grievance, but in the view we take this contested fact is immaterial because of subsequent events.

Molinaro received a letter from appellant's counsel requesting the grievance procedure be followed. Molinary then telephoned the company and asked if it would reconsider its position. The company refused. Molinaro then scheduled another meeting. He also arranged for an impartial mediator from the Federal Mediation and Conciliation Service (FMCS) to attend. Appellant, however, appeared at the meeting with a stenographer and insisted that the stenographer be permitted to transcribe the proceeding. When he was told that the stenographer would not be permitted and that it was intended to be an informal meeting, appellant refused to participate and the meeting was cancelled. Under the constitution of the international union, appellant had the right to file an appeal or charge with the Secretary/ Treasurer of the Joint Council. He failed to follow this procedure. He had a right to appeal

to do so. He had the right to appeal to the Constitutional Convention. He failed to do so. Indeed, even though represented by counsel, appellant did not attempt to initiate the first step of the internal union remedies available to him in allowing the appellate bodies of the international union to consider his claim that his local union had breached its duty to represent him fairly. The availability of these procedures and the appellant's failure to utilize them cannot be controverted.

The general rule is that before a member of any union may maintain an action against his union for breach of the duty of fair representation, the member must first exhaust all available internal union remedies. Clayton v. United Automobile Workers, 451 U.S. 679 (1981); Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048, rehearing denied, 394 U.S. 955 (1969); Gainey v. Brotherhood of Railway and Steamship Clerks, 275 F.2d 342 (3d Cir.), cert. denied, 363 U.S. 811 (1960).

In Clayton the Court set forth three exceptions to the general rule requiring exhaustion:

> [F]irst, [where] union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, [where] the internal union appeals procedure would be inadequate...to award him the full relief he seeks under Section 301; and third, [where] exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

451 U.S. at 689.

Moreover, there is a factual element in the present case which differs from Clayton in one important respect. Whereas the plaintiff in Clayton was seeking reinstatement to his former job, an examination of the complaint in the case before us now demonstrates that appellant did not request such relief here. He requested money damages and reinstatement of his union membership, but nowhere does he request reinstatement to employement with Silver Line.

Constitutional provisions for internal union relief are set forth in the union's brief.

Brief for Appellee Teamsters, etc, at 14-15. We are satisfied that the district court did not err in granting summary judgment in favor of the union on the ground that appellant did not exhaust his internal union remedies.

Whether sanctions should be imposed on the timeliness of filing a motion for summary judgment is a matter left to the discretion of the district court. We find no abuse here.

We have carefully considered all of the contentions of appellant.

Accordingly, the judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Aldisert
Circuit Judge

APPENDIX "B"

APP. 10.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1703

RUGGIERO, JR., ANTHONY,

Appellant

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 773 and SILVER LINE, INC.,

(E.D. Pa. Civ. No. 80-1932)

Present: ALDISERT, WEIS and ROSENN, Circuit Judges.

O R D E R

The Petition for panel rehearing filed by appellant in the above entitled case having been sumitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing before the original panel is denied.

BY THE COURT:

/s/ Aldisert

DATED: May 17, 1984

APPENDIX "C"

App. 11.

ANTHONY RUGGIERO, JR. : Civil Action

VS. :

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN: AMD HELPERS OF AMERICA, LOCAL NO. 773 and SILVER LINE, INC. : No. 80-1932

PRETRIAL REPORT

TRIAL COUNSEL: Pf. Ronold J. Karasek
Df. Stephen C. Richman-Union
Df. Daniel E. Cohen-Silver Line, Inc.

PRETRIAL CONFERENCE HELD ON MAY 5, 1981

1. Summary: Federal question - Section 301 Labor-Management Relations Act action.

Plaintiff, while a driver for Silver Line, Inc., was laid off on December 17, 1976, as a result of not making certain deliveries although he was advised by both Union and employer officials and authorized agents not to make such deliveries.

Plaintiff filed a grievance and attempted to exhaust his internal union remedies but alleges that such exhaustion would be ineffective.

Defendant alleges that Plaintiff was properly discharged and has failed to exhaust internal collective bargaining remedies. Also, the instant

charges were the subject of unfair labor practice charges filed with the National Labor Relations Board which were dismissed as lacking in merit.

2. Discovery is incomplete.

3. All remaining discovery is to be completed by August 1, 1981.

4. Summary judgment motions are contemplated.

5. No unusual legal issues, but whether or not plaintiff has exhausted internal union remedies and arbitration remedies.

6. Pretrial memos have been filed.

7. Settlement: Unlikely at this time.

8. Total trial time: 2 days.

9. List for trial after September 1, 1981.

(signed) Richard A. Powers
Richard A. Powers, III
United States Magistrate

APPENDIX "D"

App.13.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY

COMMONWEALTH OF PENNSYLVANIA

CIVIL DIVISION-EQUITY

Anthony Ruggiero,	:	
Plaintiff	:	No. 28 May Term 1978
v.	:	
Teamsters Local No.	:	
773 et al.,	:	
Defendants	:	In Equity

COMPLAINT

AND NOW this 1st day of May 1980 comes the Plaintiff above named by and through his attorneys, Zito, Martino and Karasek, by Ronold J. Karasek, Esquire and prays to this Honorable Court for judgment upon a cause of action whereof the following is a statement, to wit:

1.The Plaintiff, Anthony Ruggiero, Jr., is an adult individual residing on McKinley Avenue, Roseto, Northampton County, Pennsylvania.

2.The Defendant, the Local 773 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, is a labor union with an

office located at 1345 Hamilton Street, Allentown, Lehigh County, Pennsylvania.

3.The Defendant, Silver Line, Inc., is a business corporation doing business in Pennsylvania with an office located at the Penn-Cann Interchange, Wind Gap, Northampton County, Pennsylvania.

COUNT I

Ruggiero v. Teamsters

4. (Incorporation Clause)

5.From 1956 to December 16, 1976, the Plaintiff was employed by Silver Line, Inc., as a truck driver, wherein various textile materials were delivered by the Plaintiff to various factories in the Slate Belt area.

6. For the period of time aforementioned in the preceding paragraph, the union at such place of employment was the Teamsters, Local No. 773. to which the Plaintiff paid his dues and was a member in good standing.

7. As a result of such union membership, the Plaintiff respectfully avers that there existed a trust relationship between Local 773 and its members in that said union was a Trustee of the rights of

its members of the bargaining unit and therefore, had a duty and obligation to protect such rights to the best of its ability. Conversely, the members of such bargaining unit became beneficiaries of such obligation and duty owed to them by the union.

8. On or about December 17, 1976, the Plaintiff was wrongfully laid off from his job at Silver Line, Inc. This occurred as a result of his not making certain deliveries although he was advised by both the union and employer officials and authorized agents not to make such deliveries.

9. Immediately upon such layoff, the Plaintiff attempted to settle such grievance within the internal organization of the union and pursuant to the grievance procedure of Teamsters Local 773.

10. The internal organization and grievance procedure of the Teamsters Local 773 conforms with Article XII Section 1 and 2 of the collective bargaining agreement between Silver Line, Inc. and Local No. 773 of the Teamsters effective May 15, 1977 and ending May 14, 1980. A copy of such Article is attached hereto and Marked Exhibit "A".

11. The Plaintiff followed the internal procedures

in that:

(a) the day of the incident, he immediately telephoned the Business Agent of the union, Anthony Molinaro, and had a conference telephone conversation with the agent, himself, and the foremen, Kenneth Huber, of the employer. Thereupon, he was advised to return home and report the following day for work.

(b) the following day, the Plaintiff reported for work and discovered his time card was pulled out. He telephoned the foremen the following day and was advised by the foreman that he was "laid off" because of lack of work and to file for unemployment compensation benefits which were, in fact, paid.

(c) thereupon, the Plaintiff filed a grievance within the applicable time limits and in writing and brought the matter to the attention of the shop steward, Raymond Kegelitz. Mr. Kegelitz advised a meeting would be scheduled between the foremen, himself, the Plaintiff and the Business Agent.

(d) thereupon, a meeting was held pursuant to Step One of the grievance procedures heretofore described. The Plaintiff was asked to leave the meeting

while the Business agent and the foreman discussed the matter. Thereupon, the Business Agent advised he would be in touch with the Plaintiff in a "few days". There was never a written disposition of this meeting within five (5) working days as required by Step One.

(e) thereupon, not hearing from either the union or the employer, the Plaintiff telephoned the union President who transferred the call to the Business Agent and the Agent advised, "I told you before, I'll contact you."

(f) that not being a satisfactory adjustment of the matter, the Plaintiff requested the grievance to be submitted to Step Two of the grievance procedure. This was never done although repeatedly requested to do so even by the attorney for the Plaintiff who requested same by letter of November 14, 1977, a copy of which is attached hereto as Exhibit "B". Such request was reiterated by letter of December 19, 1977, a copy of which is attached hereto as Exhibit "C".

(g) in the interim, from January 1977 to November 1977, the Plaintiff telephoned the employer and was advised there was still no work for the

Plaintiff. However, the employer hired new drivers with little or less seniority than the Plaintiff. Such is in contravention of Article X, subscetions a,b,and e of the collective bargaining agreement. A copy of such article is attached as Exhibit "D".

(h) after much negotiation by Plaintiff's counsel, an arbitration hearing was scheduled for December 19, 1978, before Donald S. Blake, Commissioner of the Federal Mediation and Conciliation Service in Allentown. Such Commissioner was selected by the union.

(i) at the time of the arbitration hearing, the union and the employer would not proceed with same since the Plaintiff had brought a stenographer for which the Plaintiff would pay in order to make an adequate record of same. In fact, the Business Agent of the union became foul and abusive toward the Plaintiff and his counsel and stated the Plaintiff should take him to court.

(j) prior to the arbitration, the Commissioner advised he was apprised of the entire situation by the union's Business Agent. Later, the Commissioner advised the Plaintiff he was merely a "mediator"

and had no authority to enter into binding arbitration or be subpoenaed to testify if the Plaintiff would wish to proceed further with his instant lawsuit.

(k) The Commissioner, although requested to do so by Plaintiff's counsel, refused to reschedule the arbitration on the grounds heretofore alleged in subparagraph (j).

12. The Plaintiff respectfully avers he has attempt- to exhaust his internal union remedies, and has, in fact, done so, or, in the alternative, such exhaustion would be ineffective as a result of either/or

(a) the exhaustion cannot yield proper remedies

(b) the union officials have, by their own actions, precluded a fair effective trial or appeal,

(c) the exhaustion is unreasonably burdensome

(d) the exhaustion would lead to irreparable injuries.

13. The Plaintiff respectfully avers that the Defendant has breached its trust, duty and fiduciary obilgation owed to its members, as representative of the menbers of the bargaining unit and did not act in good faith, but acted unreasonably, arbitrarily

and fraudulently in that:

(a) the Plaintiff had paid his dues to the Teamsters Local 773 up until the time he was laid off and was a member in good standing and of long standing.

(b) the union did not act in good faith and in a reasonable manner when its authorized agents, shop stewart, so on, failed to submit the grievance to Step Two and to arbitration as required by Article XI and XII of said collective bargaining agreement as requested by both the Plaintiff and his counsel. A copy of Article XI, Section 1, is attached as Enhibit "E".

(c) by failing to follow a complete and fair investigation of both sides of the dispute in this matter, and failing to decide the matter on the merits of the controversy.

(d) after said Plaintiff was laid off, the union permitted the employer to hire new or other employees whose length of service and seniority were less that the Plaintiff's in contravention of said collective bargaining agreement.

(e) by allowing the employee to be laid off

which, in effect, became a discharge in contravention of Article XIII, Sections 1 and 2 of said collective bargaining agreement. A copy of Article XIII is attached hereto as Exhibit "F". In fact, the Plaintiff collected unemployment benefits and was then told he "voluntarily quit".

(f) by failing to properly and promptly advise the Plaintiff of the nature of the dispute and its resolution, if any.

(g) by scheduling an arbitration hearing before a Commissioner of its own choosing, and failing to proceed with the arbitration because of the fact that a record would be made.

(h) by scheduling an arbitration hearing before a Commissioner who could only act as a "mediator" and not advising the Plaintiff or counsel thereof.

(i) by discussing the matter with the Commissioner prior to the hearing thereby biasing the Commissioner and preventing a fair and impartial hearing.

14. Further, the Plaintiff respectfully avers that this Court has jurisdiction to hear this matter in that it is not federally pre-empted by the NLRA since

the activity complained of is not arguably within Section 7 or Section 8 of the NLRA since the NLRB has failed to issue Complaints on separate charges filed by the Plaintiff to Case Nos, 4-CA-9259,7892 and 4-CB-3394,3641.

15. Further, the Plaintiff respectfully avers that this Court has jurisdiction to hear this matter since it claims injury to the union/member relationship.

16. As a direct, proximate or substantial result of said breach of fiduciary duty owed by said union to the Plaintiff, the Plaintiff suffered severe and irreparable damage including:

(a) destruction of his rights and privileges in the Defendant union and losing his right of reinstatement.

(b) grievous physical and mental pain, suffering, humiliation, worry and degradation.

(c) consequential damages, collateral hereto, in loss of employment, lost wages, lost benefits, so on.

WHEREFORE, the Plaintiff respectfully prays this Honorable Court for judgment in his favor and against the Defendant as follows:

(a) restoration of Plaintiff's rights and privileges in the Defendant union and reinstatement of the Plaimtiff as member in good standing thereof.

(b) damages as a result of the illegal and unlawful conduct as hereinabove set forth including damages for grievous physical and mental pain and suffering, humiliation, worry and degradation.

(c) consequential damages as the Court may deem just and appropriate.

(d) any other relief the Court my deem just and appropriate under the circumstances.

COUNT II

Ruggiero v. Teamsters

17. (Incorpoartion caluse)

18. In spite of the Plaintiff's constant efforts to resolve the matter with the union Local 773, such union has repeatedly refused to protect the rights and interest of the Plaintiff in this matter, even though said union has a fiduciary obligation to protect the members of the bargaining unit in this matter.

19 The Plaintiff avers that the conduct as hereinabove alleged of the Defendant union Local 773 is

willful, malicious, knowing and wrongful and has failed to protect said interest of the Plaintiff in this matter.

WHEREFORE, the Plaintiff respectfully prays this Honorable Court to award the Plaintiff punitive damages in an amount your Honorable Court deems necessary and appropriate in this matter.

COUNT III

Ruggiero v. Silver Line. Inc.

20. (Incorporation clause)

21. The defendant, Silver Line, Inc., failed to comply with the terms and conditions of the collective bargaining agreement as hereto alleged as a result of the union's failure to properly represent the Plaintiff.

22. The Defendant, Silver Line, Inc. agreed to the action of the Defendant. Local 773, and the failure of the union to properly represent the Plaintiff.

23. As a result, the employer and the union acted in concert to deprive the Plaintiff of his proper rights of representation by the union and the employer is jointly or severally liable with the Defendant union.

WHEREFORE, the Plaintiff respectfully prays this Honorable Court to award the Plaintiff damages in an amount your Honorable Court deems necessary and appropriate in this matter.

Respectfully submitted,

ZITO, MARTINO and KARASEK

by: s/Ronold J. Karasek, Esquire

Attorney for the Plaintiff

State of Pennsylvania:
: SS
County of Northampton:

Before me a Notary Public in and for the County and State aforesaid personally appeared Anthony Ruggiero, Jr. who being duly sworn according to law deposes and says that the statements and allegations as contained in the within Complaint are true and correct to the best of his knowledge, information and belief,

s/ Anthony Ruggiero, Jr.

s/ Diana E. Miller, Notary Public

SECTION 1. Grievance Procedure

All grievances or disputes involving any controversy, complaint, dispute, or misunderstanding arising as to the meaning, application or observance of any provisions of this Agreement, shall be handled to the manner hereinafter set forth. It is agreed that all matters pertaining to the interpretation of this Agreement must be referred directly to the Negotiation Committee, provided that if a grievance has not been filed, the matter shall not be the subject of arbitration until a grievance is filed.

Step 1: All grievances must be made in writing to the other party within five (5) working days after the reason for such grievance has occurred. The aggrieved employee's or employees' shop steward or another authorized representative of the Union shall first submit a written grievance to the foreman in charge, or his duly authorized representative. The shop steward or another authorized representative of the Union of the employee or employees involved shall be present

at any meeting between the foreman and such employee or employees. The foreman in charge, or his duly aurhotized representative, must make a written disposition of the matter within five (5) working days after the submission of such written grievance thereto.

Step 2. If the disposition of the matter by the foreman in charge or his duly authorized representative is not satisfactory, the matter must be taken up by the Business Agent and the Employer's terminal manager, or other representative of the Employer with authority to act, within five (5) working days of the written disposition set forth in Step 1. The terminal manager or other representative of the Employer must make a written disposition of the matter within five (5) working days after the day the matter is taken up with him by the Business Agent.

SECTION 2. ARBITRATION:

If any grievance or dispute cannot be satisfactorily settled, then the grievance shall be

submitted to an impartial arbitrator, if the parties cannot agree upon the selection of an impartial arbitrator, then such selection shall be referred to the Federal Mediation and Conciliation Service no later than the next day. After the Federal Mediation and Conciliation Service submits a list of arbitrators, the Union and the Company each shall reply with their preferred selections, no later than three (3) days after receipt of such list. This cost of the arbitration shall be shared equally by the parties. The decision of the arbitrator shall be final and binding on the parties involved.

CORRESPONDENCE FROM ZITO, MARTINO AND KARASEK

November 14, 1977

Teamsters, Chauffeurs,
Warehousemen and Helpers
Local Union No. 773
1345 Hamilton Street
Allentown, Pennsylvania

Silver Line, Inc.
Penn-Can Interchange
R. D. # 1
Wind Gap, Pennsylvania

Re: Anthony Ruggiero, Jr. - employee

Gentlemen:

Please be advised that this office has been retained by Mr. Anthony Ruggiero of McKinley Street, Roseto, Northampton County, Pennsylvania, concerning his lay-off from his position at Silver Line, Inc., trucking company, Penn-Can Interchange, Wind Gap, Pennsylvania.

This office has reviewed the facts and circumstances surrounding the lay-off of Mr. Ruggiero, and it appears that this lay-off was, indeed, improper. Mr. Ruggiero advised the appropriate union representative of this grievance, and it appears that none of the grievance procedures in the Collective Bargaining Agreement entered into have been complied with.

Therefore, this letter is just to again place both of you on formal notice of my client's

grievance, and to have the grievance procedure followed, as outlined in the Collective Bargaining Agreement entered into between the Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 773, and Silver Line, Inc. If this matter is not taken up properly, this office will have no alternative but to file the appropriate legal actions to protect our client's interest in this regard.

Thank you for your cooperation in this matter. Awaiting your response, I remain,

Very truly yours,

ZITO, MARTINO and KARASEK

Ronold J. Karasek, Esquire

RJK:kao

CORRESPONDENCE FROM ZITO, MARTINO AND KARASEK

December 19, 1977

Mr. Anthony Molinaro
Teamsters, Chauffeurs, Warehousemen & Helpers
Local Union No. 773
1345 Hamilton Street
Allentown, Pennsylvania

Re: Mr. Anthony Ruggiero

Dear Mr. Molinaro:

As a sequel to our telephone conversation in the above matter on Friday, December 9, 1977, I contacted my client to review your position with him.

My client indicated to me that an original grievance was filed with both your office and the office of Silver Line, Inc. The grievance that was filed was exactly the same as the ones heretofore filed with you, and I suggest you review them thoroughly.

From my conversations with my client, it appears that he had taken the Allentown run in the past, but that he was unfamiliar with the stops on that particular run and so advised his employer and the union. He was told that he would

not have to take the Allentown run any longer as a result of his unfamiliarity with the route. In any event, on the night in question, he was again asked to take the Allentown route, contrary to these earlier agreements and his understanding.

On the night in question, after he was requested to take the run, he again brought up the fact of the prior understandings and conversations to both you, and the employer, and he was told to go home and not to worry about it. The very next day, when he again returned for work, he discovered that his time card had been pulled and that he was without a job. My client had never been given any indication that this was going to be the result of the conversations the night before when he was told to "go home and not worry about it."

Clearly, these actions indicate that my client's rights have been severly prejudiced in this matter, and I again request you to follow the grievance procedure as outlined in the Collective Bargaining Agreement entered into between your union and the employer. If not, it

will be upon this office to file all necessary and proper lawsuits to protect my client's interests in this regard.

Thank you for your cooperation in this matter.

Very truly yours,

ZITO, MARTINO AND KARASEK

Ronold J. Karasek, Esquire

RJK:kao

ARTICLE X.

SECTION 1. SENIORITY:

(a) Seniority, as measured by length of continuous service with the Employer, shall prevail at all times. The application of seniority shall be determined by mutual agreement between the Employer and the Local Union.

(e) When it becomes necessary to reduce the work force, the last employee on the seniority list shall be laid off first, and when the force is again increased, the employees are to be returned to work in the reverse order in which they were laid off, providing they still maintain seniority as described herein. And further providing the employees retained at the time of layoff, or the employees recalled at the time of recall from layoff, must be qualified to perform the work required.

EXHIBIT "D"

ARTICLE XI.

SECTION 1. STEWARDS: APPOINTMENTS AND DUTIES

The Employer recognizes the right of the Union to designate job stewards for each terminatl from the Employer's seniority list. The authority of job stewards so designated by the Union shall be limited to and shall not exceed the following duties and activities:

(a) The investigation and presentation of grievances to his Employer or the designated Company representative in accordance with the provisions of the Collective Bargaining Agreement.

ARTICLE XIII.

DISCIPLINARY PROCEDURE

SECTION 1. DISCHARGE OR SUSPENSION

The Employer shall not discharge nor suspend any regular employee without just cause. In all cases involving the discharge or suspension of an employee the Company must immediately notify the employee in writing of his discharge or suspension and the reason thereof. Such written notice shall also be given to the shop steward and a copy mailed to the Local Union office, within one (1) twenty-four (24) hour period from the time of the discharge or suspension provided, however, that the failure of the Employers to so notify the shop steward or to mail such notice to the Local Union within one (1) twenty-four (24) hour period will have no effect upon the merits of the discharge or suspension.

SECTION 2. WARNING NOTICE:

In respect to discharge, the Employer shall give at least one (1) warning notice against such employee to the employee, in writing, a copy of

same to be sent to the Local Union affected, except that no warning notice need be given to any employee before he is discharged if the causes of such discharge are for the following proved causes: dishonesty, drinking while on duty, or the carrying of unauthorized passengers. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of the occurrence upon which the complaint and warning notice are based.

APPENDIX "E"

App. 38.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY RUGGIERO, JR.,	:	Civil Action No.
Plaintiff	:	80-1932
vs.	:	
TEAMSTERS, et al.,	:	
Defendants	:	

PLAINTIFF'S AFFIDAVIT CONTRA TO DEFENDANT'S (UNION) MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF NORTHAMPTON)

The undersigned, Anthony Ruggiero, Jr., the Plaintiff, being duly sworn according to law, deposes and says as follows:

1. For approximately 13 years, I was employed by Silver Line, Inc., and a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 773.

2. The only internal union procedure of which I was award were as found in the collective bargaining agreement between the Co-Defendants,

copies of which have been heretofore attached to Plaintiff's pleadings.

3. At no time prior to (or after institution of) suit, did the said Anthony Molinaro, Sr., as Business Agent for Local No. 773, or any other union personnel advise me, or my counsel, of the procedures outlined in Molinaro's affidavit in Support of Summary Judgment.

4. During the course of pre-suit "representation" by the Union, the said Anthony Molinaro, Sr. led the Plaintiff and his counsel to believe an arbitration hearing was scheduled in lieu of proceeding with the lawsuit that had already been filed when, in fact, it was merely mediation and would not proceed with the hearing since a stenographer was present. A copy of a memorandum transcript filed in the instant action at the state level is attached hereto and marked Exhibit "A" and is hereby made a part hereof.

5. At the time of the aforesaid hearing, the Mediator made clear to the Plaintiff that he had already been informed of the facts of the case

and felt the Plaintiff was wrong. When questioned by Plaintiff's counsel as to his impartiality, the Mediator advised he had spoken with Mr. Molinaro and was advised by Molinaro that he could never be subpoenaed if the matter went to Court so we could never his impartiality!

6. A fortiori, the conduct of the said Anthony Molinaro, Sr., and his failure to advise and assist the Plaintiff in processing any claim at the international level bespeaks of bad faith and improper representation.

7. I made this affidavit from my own personal knowledge, and swear that I would be competent to testify to the above matters in a Court of Law.

/s/ Anthony Ruggiero, Jr.
Anthony Ruggiero, Jr.

Sworn to and subscribed before me
this 11th day of August, 1982.

/s/ Lynette Bierman
Lynette Bierman, Notary Public
Bangor, Northampton County, PA.
My Commission Expires November 12, 1985.

FEDERAL MEDIATION AND CONCILIATION SERVICE

RE: RUGGIERO V. TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, ET AL.) No. 28 May Term 1978

Proceedings, Tuesday, December 19, 1978, at 1:00 o'clock, p.m., at the Service Office, Suite 123, 1503 Cedar Crest Boulevard, Allentown, Pennsylvania

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APPEARANCES:

Ronold J. Karasek, Esq., for the Appellant

ANTHONY MOLINARO, for the Union

Proceedings reported by William J. Kocher, Registered Professional Reporter.

MR. KARASEK: Let the record show that an arbitration hearing was to be held today, the 19th day of December, 1978, before the Federal Mediation and Conciliation Service, by Donald S. Blake, Commissioner, at 1503 Cedar Crest Boulevard, Suite 123, Allentown, Pennsylvania, pursuant to various contract provisions between the Teamsters

Union and Silver Line, Inc., and the employees, pursuant to a collective bargaining agreement that they had entered into. A lawsuit was filed with the Court of Common Pleas of Northampton County to the above number and term against the employer for a wrongful discharge and against the union for breach of their representation.

After that action was filed, it was agreed between the Teamsters Union, the employer, and the attorney for the employee, that this arbitration hearing would be held, so that the matter could be finally resolved. Today an arbitration hearing was scheduled, wherein I requested a court stenographer, Mr. William Kocher, of the Court of Common Pleas of Northampton County, to attend, so that a record could be made, in the event any appeal would be wished to be taken from this hearing, pursuant to the usual and customary rules for appealing these decisions in arbitration hearings.

Thereupon, Mr. Anthony Molinaro, the Business Agent for the Teamsters Union, when he recognized

the fact that a court stenographer would be transcribing the notes and various facts and other statements during the hearing, objected to the procedure and stated that he would not consent to the arbitration and that Mr. Ruggiero should file any and all necessary lawsuits and other matters to protect his interest.

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me upon the hearing held December 19, 1978, and that this copy is a correct transcript of the same.

DATED: December 26, 1978

(Signed) William J. Kocher
William J. Kocher
Official Stenographer
Court of Common Pleas
of Northampton County

APPENDIX "F"

App. 44.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY RUGGIERO, JR.,	:	Civil Action
	:	No. 80-1932
Plaintiff	:	
	:	
vs.	:	
	:	
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 773 and SILVER LINE., INC.,	:	
	:	
Defendants	:	

AFFIDAVIT OF RONOLD J. KARASEK, ESQUIRE CONTRA TO DEFENDANT'S (UNION) MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF NORTHAMPTON)

The undersigned, Ronold J. Karasek, Esquire, as attorney for the Plaintiff, being duly sworn according to law, deposes and says as follows:

1. A copy of the docket entries attached as Exhibit "A" in the above matter (prior to the removal from state court) verified the date of institution of the suit was August 8, 1978, and not May 20, 1980, as argued in Defendant's Brief.

2. During pendency of the suit, the Union led Plaintiff's counsel to believe that in the interest of settlement it was attempting to process the Plaintiff's grievance. See copies of correspondence attached hereto and marked Exhibits "B" and "C".

3. Plaintiff and his counsel were led to believe an arbitration hearing was scheduled as evidenced by correspondence attached hereto and marked Exhibits "D", "E", "F" and "G".

4. At no time during the period of the aforesaid correspondence, September through December of 1978, did anyone from the union or the Mediator's office advise that the hearing was to be "mediation" as opposed to "arbitration" although the aforesaid correspondence clearly stated "arbitration".

5. Only after the meeting took place, did the Commissioner advise as to the exact nature and conduct of the meeting. See copy of correspondence attached hereto and marked Exhibit "H".

6. Depositions of a one Gilbert Overpeck

evidences that although Mr. Overpeck, on the same evening, also refused to take the specific run for which the Plaintiff was discharged, Mr. Overpeck was only laid off and later rehired.

7. I made this affidavit from my own personal knowledge on matters that occurred during my representation of the Plaintiff and I would be competent to testify to the above matters in a Court of Law.

/s/ Ronold J. Karasek
Ronold J. Karasek, Esquire
I.D. No. 23233

Sworn to and subscribed before
me this 11th day of August, 1982.

/s/ Lynette Bierman
Lynette Bierman, Notary Public
Bangor, Northampton County, Pa.
My Commission Expires November 12, 1985.

R. KARASEK ANTHONY RUGGIERO, JR.
23233

28 YS.

VCS

33.90 TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN AND HELPERS OF AMERICA, LOCAL 773

AND

SILVER LINE INC.

PRAECIPE FOR WRIT OF SUMMONS : IN EQUITY

: AUGUST 8, 1978 EXIT

: RETURNED 8/9/78 BY SHERIFF

: SERVED 8/14/78

App. 47.

Exhibit "A"

12.50 PD AUGUST 8, 1978 PRAECIPE RILED.

FEBRUARY 22, 1979 PROCEEDINGS FILED.

VCS 36.00 MAY 2, 1980 COMPLAINT FILED BY R. KARASEK, ESQ. EO DIE EXIT. SERVED MAY 6, 1980 SILVER LINE, INC.; SERVED MAY 8, 1980 TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN AND HELPERS OF AMERICA, LOCAL 773.

JUNE 6, 1980 PLAINTIFF'S ANSWER TO DEFENDANTS' PETITION FOR REMOVAL FILED BY RONOLD J. KARASEK, ESQ.

CORRESPONDENCE FROM ZITO, MARTINO AND KARASEK

August 15, 1978

Mr. Anthony Mollinaro

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS
1345 Hamilton Street
Allentown, Pennsylvania

Re: Anthony Ruggiero, Jr., v. Silver Line, Inc. et al, Pasquale N. Leraris v. Silver Line, Inc.

Dear Mr. Mollinaro:

This will confirm our telephone conversation of Monday, August 14, 1978, concerning the two (2) above captioned matters in which our respective officers are involved.

Concerning the Leraris matter, you stated to me that it appears that a settlement has been reached between your union and the employer where Mr. Leraris would be reinstated at his position at Silver Line, Inc., provided that he follows the conditions we discussed at the meeting that was held at your office in Allentown on Wednesday, July 26, 1978. In addition, you

advised me that you will be contacting me within the near future as to when Mr. Leraris will be allowed to begin work once again; and, in the interim, I will draft a letter to him concerning this reinstatement and terms hereof.

Concerning the Anthony Ruggiero matter, you advised me that you were served with the Writ in Equity which I had filed on behalf of my client concerning that particular labor matter and, again, in the interest of settling that dispute, you will contact me as to a date, time and place when we can have a meeting and/or hearing at your office to further discuss this matter.

Thanking you for your cooperation in these matters, I remain,

Very truly yours,

ZITO, MARTINO and KARASEK

Ronold J. Karasek, Esquirr

RJK:kao

CORRESPONDENCE FROM ZITO, MARTINO AND KARASEK

August 23, 1978

Mr. Antony Mollinaro
Teamsters, Chaufferus, Warehousemen
and Helpers
1345 Hamilton Street
Allentown, Pennsylvania

Re: Anthony Ruggiero, Jr., v. Silver Line, Inc., et al.

Dear Mr. Mollinaro:

As a sequel to our telephone conversation in the above matter of Monday, August 14, 1978, I would appeareciate hearing from you as to when we can arrange a meeting between the appropriate parties to further discuss this case with the hopes of reaching an amicable resolution of the matter.

Of course, in the interim, unless I am ruled otherwise, I will postpone filing a Complaint, in the interest of determining whether a resolution can be reached.

Thanking you for your anticipated cooperation in this regard, I remain,

Very truly yours,

ZITO, MARTINO and KARASEK

RJK:kao

Ronold J. Karasek, Esquire

EXHIBIT "C"

convenient with not only me and my client's schedule, but also with your schedule and that of your employer and, of course, the arbitrator.

Thanking you for your cooperation in this regard, I remain,

Very truly yours,

ZITO, MARTINO and KARASEK

Ronold J. Karasek, Esquire

RJK:kao

CORRESPONDENCE FROM ZITO, MARTINO and KARASEK

September 12, 1978

Mr. Antony Mollinaro
Teamsters, Chauffeurs, Warehousmen
and Helpers
1345 Hamilton Street
Allentown, Pennsylvania

Re: Anthony Ruggiero, Jr. v. Silver Line, et al.

Dear Mr. Mollinaro:

This will confirm our telephone conversation of Thursday, September 7, 1978, wherein you stated that the union and the employer would be willing to schedule an arbitration hearing to be held in regards to this matter, so that a determination can be made as to the grievance filed by Mr. Ruggiero. You stated to me that the hearing could be scheduled as soon as either Wednesday, September 13, 1978, or Thursday, September 14, 1978. However, I have discussed the matter with my client and, to be quite frank, neither my client nor this office would be able to sufficiently prepare for a hearing at such early dates.

Accordingly, I would appreciate hearing from you as to several tentaive dates during the month of October, 1978, which, perhaps, would be more

CORRESPONDENCE FROM ZITO, MARTINO AND KARASEK

October 13, 1978

Mr. Anthony Mollinaro
Teamsters, Chauffeurs, Warehousemen
and Helpers
1345 Hamilton Street
Allentown, Pennsylvania

Re: Anthony Ruggiero, Jr., v. Silver Line, et al.

Dear Mr. Mollinaro:

This letter is a sequel to my letter to you dated September 12, 1978, in the above matter. I would appreciate hearing from you as to some tentative dates wherein we can schedule the arbitration hearing in this regard.

Thank you for your cooperation in this matter.

Very truly yours,

ZITO, MARTINO and KARASEK

Ronold J. Karasek, Esquire

RJK/kao

EXHIBIT "E"

CORRESPONDENCE FROM ZITO, MARTINO AND KARASEK

November 10, 1978

Mr. Anthony Mollinaro
Teamsters, Chauffeurs, Warehousemen
and Helpers
1345 Hamilton Street
Allentown, Pennsylvania

Re: Anthony Ruggiero, Jr., v. Silver Line, et al.

Dear Mr. Mollinaro:

I would appreciate hearing from you in regard to my letter to you of September 12, 1978, so that in the event an arbitration is scheduled, I may be able to confirm same with my client and with my schedule. If we are not going to proceed to an arbitration, then please advise so that I may proceed with the equity action which has been filed with the Court of Common Pleas of Northampton County.

Thanking you for your cooperation in this regard, I remain,

Very truly yours,

ZITO, MARTINO and KARASEK

Ronold J. Karasek, Esquire

RJK:kao

EXHIBIT "F"

CORRESPONDENCE FROM ZITO, MARTINO and KARASEK

December 4, 1978

Mr. Donald S. Blake, Commissioner
Federal Mediation and Conciliation Service
1503 Cedar Crest Boulevard
Suite 123
Allentown, Pennsylvania 18104

Re: Anthony Ruggiero, Jr., v. Teamsters, Chauffeurs, Warehousemen and Helpers of America and Silver Line, Inc.

Dear Commissioner Blake:

This letter is a sequel to our meeting at your office in the above matter, wherein the arbitration hearing in this case was rescheduled to Tuesday, December 19, 1978, at 1:00 p.m. In the interim, I would appreciate hearing from you as to the extent of your subpoena power for arbitrations such as these, and I would appreciate if you could also send to me approximately five (5) subpoenas,so that I may issue them to any individuals who may be recalcitrant to testify in this regard.

Thanking you for your cooperation in this matter, I remain,

Very truly yours,
Ronold J. Karasek, Esquire

EXHIBIT "G"

APPENDIX "G"

App. 56.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY RUGGIERO, JR., : Civil Action No.

Plaintiff : 80-1932

vs. :

TEAMSTERS, ET AL., :

Defendants:

DEPOSITION OF GILBERT OVERPECK taken on Monday, July 6, 1981, commencing at 1:30 p.m. in Room 112 of the Northampton County Government Center, Easton, Pennsylvania.

A P P E A R A N C E S :

RONOLD J. KARASEK, ESQUIRE
For the Plaintiff

QUINTES D. TAGLIOLI, ESQUIRE
For Defendant Union

DANIEL E. COHEN, ESQUIRE
For Defendant Silver Line

Q And did you collect unemployment compensation?

A: Yes, I have, yes.

Q Now, did there come a time, Mr. Overpeck, when, if at all, you were rehired by Silver Line?

A Yes, about a year and a half later, year and

six months, maybe seven months; I can't recall to the date, you know.

Q What happened? How did that come about?
A I was home. They called me up and they asked me if I wanted to take the New York run, run a couple of loads in to New York. Well, I wasn't working at the time. So I run them.

Q Did you continue to work there.
A I worked. I don't know. I would say I worked four to six weeks, in that area.

Q Was that steady work during that time?
A Yes. I was working like four to five days a week, Yes.

Q. And after that four-six week period, you no longer worked there. Is that correct?
A No. I didn't want nothing to --

Q. How did that termination come about?
A I just didn't -- well, I had lost all my seniority and everything. I just looked for another job and that was all.

Q So you quit then at this point in time?
A Yes. I had quit, yes.

Q Now, Mr. Overpeck, how long had you been working at Silver Line in the sense of in terms or years?

A Well, I had worked back in '64 for them; then from '70 to '73, I would say.

Q O.K. And just so we're clear, when you worked in '64, how long was that period until you stopped working for them?

A That was a little over a year.

Q Then the next time was when?

A Back '70 to about '73, it was -- I was there around three years then.

Q Then how long was the next time you worked for them?

A About a year. Well, it was back in '70. O, boy. Late part of '75, '76, it was.

Q Until the time that you were laid off or whatever --

A Yes.

Q -- in mid December of '76.

A Yes.

Q Were you acquainted with Mr. Anthony Ruggiero, who was --

A Yes.

Q --an employee there?

A Yes.

Q Based upon your understanding of how long you were there, was Mr. Ruggiero there longer--

A Yeah.

Q -- or less than you?

A Yeah. He was an older man than I was. I was the younger man in seniority.

MR. COHEN: I object to the answer as not being responsive.

BY MR. KARASEK:

Q Let me ask you this so it's clear here. Was he there for a longer period of time than you were?

MR. COHEN: If you know.

BY MR. KARASEK:

Q If you know.

A He was there quite a while. I can't say how many years, you know, but I know he was there longer than I was.

Q Now, in regard to Mr. Ruggiero's job

classification, was it the same as yours?

A Yeah. He had a Bangor run, bid run, yes.

Q That's what I'm getting to. From your knowledge, do you know what run he had?

A The Bangor run, Slate Belt Area, whatever you want to call it. They call it the Bangor run, Bangor-Roseto.

Q Was that also a bid run?

A Yes, yes, as far as -- to my knowledge, it was, but most of them were bid runs at that time.

Q And do you know how long he had been running that run?

A Ever since I can remember.

Q Was that -- when you say ever since you can remember --

A When I started there.

Q Would that be when you started in '64 or the '70's?

A Back in the '70's, I would say, '72, '73, he had the run - the Bangor run.

Q Now, after you were told to go home that evening -- I guess you don't really know what

transpired or what happened between Mr. Ruggiero and his superiors -- I take it.

A No. I was not there. I couldn't say what happened or -- I would be lying if I did say. I don't know.

Q But you were then when they had a follow-up meeting the next day.

A Yes.

Q Or whenever that was. Is that --

A Yes, sir.

Q And Mr. Ruggiero was also present at that time?

A Yes.

MR. KARASEK: Off the record.

(There is a discussion off the record.)

MR. KARASEK: Back on the record again.

Q Am I correct in my understanding, Mr. Overpeck, that ...

18. Daily reporting at time shift would start.

19. Once or twice for shortages. I can't remember when.

20. I gave too many goods at a plant and when the mistake was discovered obviously someone else's goods would be short by the surplusage mistakenly delivered elsewhere. Further, if I would go back to the plant where the surplusage was delivered, they would deny it, so I was stuck with the shortage.

21. Reprimand slip.

22. I believe it was Kenneth Yetter.

23. None.

24. (a) I was a senior man at the terminal. I had a bid run for years of the Bangor-Slate Belt Area. My discharge or lay-off was the result of my refusal to take the Allentown run was contrary to the terms of the contract and contrary to my bid.

(b) The Allentown run with stops

undetermined.

(c) (1) This was not my run and contrary to my bid.

(2) I did not know the delivery route(s) or stops.

(3) Since I was senior, the junior men should have been required to take the run as was required and was customary practice.

(d) (1) Kenneth Huber: "If you don't want to make deliveries, go home."

(2) Then I called Anthony Molinaro and he ...

(e) I called both the employer and especially the union to move the matter along. I did this until November of 1977 when I contacted a lawyer and he also sent a letter requesting this.

(f) Article XII of the Collective Bargaining Agreement outlines the steps of the grievance procedure.

(g) The contract states employees with higher seniority are called back first after lay-off. Accordingly, if job slots open up the

laid-off employees are to be re-hired first, in order of seniority, and then new people can be hired.

(h) I cannot remember with whom I spoke, only that there was no work available.

(i) Correspondence and telephone conversations between my Attorney and Mr. Molinaro.

26. (a) Grievance procedures as outlined in the collective bargaining agreement and personal meetings.

(b) (1) No written memorandum of initial meetings as required by the contract.

(2) Numerous unanswered and unreturned calls and inquiries to both employer and union representatives for almost a year.

(3) Scheduling of an arbitration hearing and then stating it was only "mediation".

(4) Scheduling an arbitration and refusing to proceed since a stenographer was present.

(5) Needing an attorney to represent me, the union is supposed to be representative pursuant to the contract.

(c) (1) They have denied even things

that were agreed to with my attorney.

(2) Prior to the time of the hearing (arbitration or mediation) Commissioner Blake was already told about my case by the union representatives and was biased to the employer and union position so that a full fair hearing would have been impossible.

(3) Treated other employees in the same position differently than I was treated.

(d) It was almost three (3) years from my termination before I proceeded with the instant lawsuit by filing a full Complaint. The three (3) years was more than sufficient time for the matter to be resolved by internal remedies. Further, the lawsuit was necessary to protect my legal rights and position.

(e) More time would pass, memories would fade, witnesses would be unavilabile (in fact, as noted, some potential witnesses have died), loss of union benefits and pension rights and much anxiety and emotional and physical effects.

27. (a) Already answered.

84-214

No.

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1984

ANTHONY RUGGIERO,

Petitioner

v.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 773 AND SILVER LINE, INC.,

Respondents

BRIEF OF RESPONDENT TEAMSTERS LOCAL NO. 773 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard H. Markowitz, Esquire
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PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — *(Continued)*

Statutes

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1984

Anthony Ruggiero,

Petitioner

v.

Teamsters, Chauffeurs, Warehousemen
and Helpers of America, Local No. 773
And Silver Line, Inc.,

Respondents

BRIEF OF RESPONDENT TEAMSTERS LOCAL NO. 773 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Rule 22.1 of the Rules of this Court, this memorandum is submitted on behalf of respondent, Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 773 (hereinafter "Union") in opposition to the petition of Anthony Ruggerio for a writ of certiorari to the United States Court of Appeals for the Third Circuit, seeking to review the decision of that court affirming the entry of summary judgment against him.

QUESTIONS PRESENTED FOR REVIEW

I. Did the court of appeals err in affirming the grant of summary judgment against petitioner in his action against his employer for wrongful discharge and against his union for breach of the duty of fair representation, where petitioner made no attempt to utilize the internal union remedies available to him and offered no legal justification for his failure to do so?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a), states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

This action was commenced by petitioner, Anthony Ruggerio, Jr., a former employee of respondent, Silver Line, Inc. (hereinafter "Company") and a member of respondent Union, in state court. This action was thereafter removed by the Union to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1441(b).

In his Complaint, Ruggerio alleged that the Company breached its collective bargaining agreement with the Union by its termination of his employment on or

about December 17, 1976 (J.A. 11). Ruggiero further alleged that the Union had breached its duty of fair representation by its failure to process his claims against the Company to arbitration (J.A. 15).

After answers were filed and discovery completed, the Union filed a motion for summary judgment. The district court granted the Union's motion on the ground that Ruggiero had failed to exhaust his internal union remedies. Later the Company filed a motion for summary judgment. This motion was not opposed by Ruggerio, "without prejudice to his rights to contest on further appeal the Court's earlier granting of summary judgment in favor of the Union" (J.A. 3). The district court accordingly entered an order granting summary judgment in favor of the Company.

Thereafter, Ruggiero appealed to the United States Court of Appeals for the Third Circuit from the entry of summary judgment against him. In its Memorandum Opinion of April 30, 1984, the court of appeals affirmed the ruling of the district court in all respects (J.A. 2-6). After carefully considering all of Ruggiero's contentions, the court of appeals stated that it was satisfied that the district court had not erred "in granting summary judgment in favor of the Union on the ground that appellant did not exhaust his internal union remedies" (J.A. 6).

Ruggiero's petition for rehearing was denied by the court of appeals in an Order dated May 17, 1984 (J.A. 7). Thereafter, Ruggiero filed the instant petition for writ of certiorari.

B. FACTS

Ruggiero was employed by defendant Company as a truck driver for approximately 13 years (J.A. 10). In December, 1976, Ruggiero was assigned by the Company to follow a certain delivery route. When Ruggiero refused to perform this assignment, claiming that it was unfamiliar to him, he was discharged.

Several days later, the Union business agent, Anthony Molinaro, arranged for a meeting to be held with representatives of the Company in order to discuss the Company's refusal to permit Ruggiero to return to work. At this meeting, Molinaro attempted to persuade the Company's General Manager, Kenneth Huber, to allow Ruggiero to return to his job but Huber refused to do so.

The collective bargaining agreement then in effect between the Company and the Union provided for a grievance and arbitration procedure for the resolution of disputes arising under said agreement. The first step of this procedure provided that:

> All grievances must be made known in writing to the other party within five (5) working days after the reason for such grievance has occurred (J.A. 22).

Ruggiero never filed a grievance protesting his discharge pursuant to this contractual procedure.[1]

Some eleven months later, the Union business agent received a letter from Ruggiero's counsel requesting that the grievance procedure be followed (J.A. 23). Molinaro then telephoned the Company and asked if it would reconsider its position and permit Ruggiero to return to work. When the Company refused to reinstate Ruggiero, Molinaro scheduled another meeting and arranged for an impartial mediator from the Federal Mediation and Conciliation Service to be present at such meeting. Ruggiero, however, appeared at this meeting with a stenographer and insisted that the stenographer be permitted to transcribe the proceedings. When he was told that the stenographer would not be permitted to attend what was intended to be an informal meeting on his behalf, Ruggiero refused to participate and the meeting was cancelled.

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1. Although Ruggiero alleges that he did file such a grievance, this contested fact is immaterial because of subsequent events.

Under the Constitution of the International Union, Ruggiero had the right to file an appeal or charge with the Secretary-Treasurer of the Joint Council if he believed that his Local Union had acted improperly in processing his alleged grievance.[2] Ruggiero never filed any such charge or appeal. Ruggiero also had a right to appeal from the decision of the Joint Council to the General Executive Board of the International Union and from there to the Constitutional Convention. Ruggiero failed to file any such appeal. Thus, Ruggiero did not attempt to initiate even the first step of the internal union remedies available to him in order to allow the appellate bodies of the International Union to consider his claim that his Local Union had breached its duty to represent him fairly.

SUMMARY OF ARGUMENT

This petition for writ of certiorari should be denied since the issues it raises were recently settled by this Court; the decision of the court below is fully consistent with prior decisions of this Court and with the decisions of the other federal courts of appeals.

REASONS FOR DENYING THE WRIT

In his petition for writ of certiorari, Ruggiero asks this Court to review the decision of the court below affirming the dismissal of his action against the Union for an alleged breach of the duty of fair representation on the ground that he failed to exhaust his internal union remedies. Yet this precise question — whether an employee is required to exhaust available internal union remedies before bringing suit against his union for breach of the duty of fair representation — was recently

2. The Joint Council is an intermediate appellate body within the International Union composed of delegates from each of the local unions within that particular geographical area.

settled by this Court in *Clayton v. United Auto Workers*, 451 U.S. 679 (1981).

In *Clayton*, the plaintiff sued his union and his employer alleging a breach of the duty of fair representation and a wrongful discharge. The plaintiff sought reinstatement to his job and money damages in the form of back pay. The district court dismissed plaintiff's suit against both the union and the employer on the ground that he failed to exhaust his internal union remedies. The court of appeals affirmed the dismissal of Clayton's suit aginst the union but reversed the dismissal of his suit against the employer. This Court granted certiorari to resolve the conflict which had developed in the courts of appeals over whether an employee should be required to exhaust internal union appeals procedures before bringing suit against a union or employer under Section 301.

Although declining to "impose a universal exhaustion requirement", this Court held that under appropriate circumstances the failure of a plaintiff to exhaust his internal union remedies should result in dismissal of his suit for breach of the duty of fair representation. 451 U.S. at 689. In *Clayton*, this Court specified three exceptions to the general rule requiring exhaustion of internal union procedures. These three exceptions are:

> 1. Where union officials are so hostile to plaintiff that he will be denied a fair hearing on his claim;
>
> 2. Where the internal union appeals procedures are inadequate to award plaintiff the full relief he seeks in his Section 301 action or to reactivate his grievance; and
>
> 3. Where exhaustion of internal union procedures would unreasonably delay the plaintiff's opportunity to obtain a judicial hearing on the merits of his claim. *Ibid.*

If any of these exceptions are found to exist, said this Court in *Clayton*, the courts may properly excuse a

plaintiff's failure to exhaust. But, stressed this Court, in the absence of any of these exceptions, a plaintiff's failure to exhaust his internal union remedies should result in dismissal of an action against his union for breach of the duty of fair representation. In so holding, this Court emphasized the strong federal labor policy favoring the exhaustion requirement when it stated:

> Where internal union appeals procedures can result in complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would advance the national labor policy of encouraging private resolution of contractual labor disputes. In such cases, the internal union procedures are capable of fully resolving meritorious claims short of the judicial forum. . . . In either case, exhaustion of internal remedies could result in final resolution of the employee's contractual grievance through private rather than judicial avenues. 451 U.S. at 692.

In *Clayton*, this Court found that the plaintiff should have been excused from the exhaustion requirement since the internal procedures available to him were inadequate to award him a critical part of the relief he was seeking, namely, reinstatement to his job. In this case, by contrast, the internal union remedies available to Ruggiero were completely adequate to afford him the full relief he seeks in this Section 301 action. Whereas the plaintiff in *Clayton* was seeking reinstatement to his former job, Ruggiero did not seek such relief herein. Although Ruggiero asserts that he did request reinstatement to his former job (Brief of petitioner, pp. 36-37), this contention was properly rejected both by the district court and the court of appeals. In Count III of his Complaint, which states his cause of action against defendant Company, Ruggiero seeks only money damages (J.A. 19-20). Nowhere in his Complaint does petitioner request reinstatement to his employment with Silver Line, Inc. (J.A. 9-20).

Under the standards set forth by this Court in *Clayton*, the internal union remedies available to petitioner were completely adequate to afford him the full relief he seeks in this Section 301 action. These same internal union remedies have previously been reviewed by the courts and have been found to be fair and adequate. See *Tinsley v. United Parcel Service, Inc.*, 635 F.2d 1288 (7th Cir. 1980), *affirmed on remand*, 665 F.2d 778 (7th Cir. 1981); *Pawlak v. Teamsters Local 764*, 444 F.Supp. 807 (M.D. Pa. 1977), *affirmed*, 571 F.2d 572 (3d Cir. 1978); *Winter v. Teamsters Local 639*, 569 F.2d 146 (D.C. Cir. 1977).

Nor are any of the other exceptions to the exhaustion requirement set forth by this Court in *Clayton* applicable here. Although Ruggiero alleges that exhaustion of his internal union remedies would have been futile because the Union's officials "prevented a fair and effective appeal" (Brief of petitioner, p.23), Ruggiero presented absolutely no evidence in the district court to suggest that he could not have received a fair hearing from the appellate bodies of the International Union. Ruggiero's conclusory allegations that it would have been futile for him to pursue his internal union remedies are not sufficient to excuse him from the exhaustion requirement and were properly rejected by the court of appeals. See also *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048, *rehearing denied*, 394 U.S. 955 (1969); *Pawlak v. Teamsters Local 764, supra; McClain v. Mack Trucks, Inc.*, 494 F. Supp. 114 (E.D.Pa. 1980).

Likewise, the court of appeals properly rejected Ruggiero's contention that he should have been excused from the exhaustion requirement on the ground of unreasonable delay. Although Ruggiero was represented by counsel as early as November, 1977, his complaint was not filed until May, 1980 (J.A. 37). Thus, Ruggiero is hardly in a position to allege that exhaustion of his in-

ternal union remedies would have unreasonably delayed his attempt to obtain relief, especially since he did not take even the first step in the appeals process.

Although Ruggiero alleges that he would have been irreparably injured had he exhausted his internal union remedies (Brief for petitioner, p. 23), Ruggiero never presented any evidence to support this contention. Ruggiero would not have been injured had he availed himself of the internal union remedies open to him. Ruggiero could have obtained through these internal union procedures the full and complete relief he sought in this Section 301 action — money damages and reinstatement to his membership in the Union — had he established to the appellate bodies of the International Union that he had not been properly represented by his Local Union.

Finally, the court of appeals properly rejected Ruggiero's contention that he should be excused from the exhaustion requirement because he was not "aware" of such remedies (Brief of petitioner, pp. 23,24). See *Pawlak v. Teamsters Local 764, supra; Newgent v. Modine Manufacturing Company*, 495 F.2d 919, 920 (7th Cir. 1974); *Neipert v. McKee & Company*, 448 F. Supp. 206 (E.D. Pa. 1978).

In affirming the grant of summary judgment against Ruggiero, the court below properly applied the principles set forth by this Court in *Clayton*. The court of appeals correctly concluded that none of the exceptions set forth by this Court in *Clayton* were applicable, and that the district court's entry of judgment against Ruggiero was consistent with the national labor policy of "encouraging private resolution of contractual labor disputes." 451 U.S. 692.

This petition does not raise any novel or important question of federal labor law. To the contrary, the various contentions advanced by Ruggiero were settled by the decision of this Court in *Clayton*. In *Clayton*, this

Court set forth the standards to be applied in this type of situation. The court below properly applied those standards and there is no reason for this Court to review its decision.

Contrary to petitioner, the decision of the court below is fully consistent with prior decisions of this Court and with the decisions of other federal courts of appeals. Since the decision of this Court in *Clayton*, other courts of appeals have reaffirmed the applicability of the exhaustion requirement under the circumstances presented herein. See *Miller v. General Motors*, 675 F.2d 146 (7th Cir. 1982); *Tinsley v. United Parcel Service, Inc., supra*. Moreover, the decision of the court below is squarely in accord with numerous decisions of other federal courts of appeals establishing that a member of a union must exhaust all internal union remedies prior to maintaining an action against his union for breach of the duty of fair representation. See, for example, *Keppard v. International Harvester Company*, 581 F.2d 764 (9th Cir. 1978); *Baldini v. United Auto Workers, Local Union No. 1095*, 581 F.2d 145 (7th Cir. 1978); *Winter v. Teamsters Local 639, supra; Imel v. Zohn Manufacturing Company*, 481 F.2d 181 (10th Cir. 1973); *Buzzard v. Local Lodge 1040*, 480 F.2d 35 (9th Cir. 1973).

Ruggiero contends that the decision of the court below is inconsistent with the decision of the Court of Appeals for the Eighth Circuit in *Sandobal v. Armour and Company*, 429 F.2d 249 (8th Cir. 1970). This contention, however, is without merit. In *Sandobal*, there was no issue concerning plaintiff's failure to exhaust his internal union remedies; the issue there, among others, was whether plaintiff had exhausted his remedies under the contractual grievance procedure, as required by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In *Sandobal*, it is true that the court of appeals found that summary judgment was not appropriate where there was "substantial disagreement between the parties as to

whether plaintiff did attempt to comply with the grievance machinery and whether his efforts were blocked by the wrongful acts of the Company and the Union." *Ibid* at 257. In this case, by contrast, there is no such dispute. Ruggiero was not prevented from exhausting his internal union remedies by any wrongful acts of the Company or the Union; Ruggiero simply made no attempt to exhaust the internal union remedies available to him. Ruggiero's contention that he did attempt to exhaust his internal union remedies is without merit and confuses the requirement that a plaintiff exhaust the grievance procedure contained in the collective bargaining agreement, which was the issue raised in the *Sandobal* case, with the requirement of exhaustion of internal union remedies. See *Willetts v. Ford Motor Company*, 583 F.2d 852, 856 (6th Cir. 1978). In this case, Ruggiero made no effort to exhaust the internal union remedies available to him and summary judgment was properly entered against him.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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